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No. 9, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATES OF LOUISIANA, TEXAS, MISSISSIPPI, ALABAMA, AND FLORIDA

Defendants.

(ALABAMA BOUNDARY CASE)

EXCEPTIONS OF THE STATE OF ALABAMA TO THE REPORT OF THE SPECIAL MASTER FILED APRIL 30, 1984, AND BRIEF IN SUPPORT OF EXCEPTIONS

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EXCEPTIONS

The State of Alabama does not take exception to the reported recommendations of the Special Master or to the bases of those recommendations. Alabama does take exception to the Master's omission of specific, independent recommendations on two questions:

1. Did Alabama's Act of Admission, not on its face but as historically interpreted, recognize the dividing line between Mississippi Sound and the Gulf of Mexico, and establish the state's historic land boundary along the seaward side of Dauphin Island?

2. If Dauphin Island is an extension of the mainland, but Mississippi Sound as a whole is not a juridical bay, is there a smaller juridical bay enclosed by a line from the western extremity of Dauphin Island to Point aux Chenes on the mainland?

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(ALABAMA BOUNDARY CASE)

BRIEF IN SUPPORT OF EXCEPTIONS

SUMMARY OF THE CASE

The Special Master accurately and appropriately summarized the case in his report at pages 1-3. Alabama adopts this summary including the Master's characterization of the primary issue.

SUMMARY OF ARGUMENTS

I. HISTORIC LAND BOUNDARY

The Special Master found Alabama's Act of Admission did not, *on its face*, establish the State's southern boundary line (Rpt. 33). The Master did not consider whether Alabama's Act, *as historically interpreted*, recognized the divid-

ing line between Mississippi Sound and the Gulf of Mexico and established the State's historic land boundary along the seaward side of Dauphin Island (Rpt. 33-34). Alabama believes if it can factually establish such a line as its admission boundary, the doctrine of *Pollard's Lessee v. Hagan*, 3 How. 212 (1845) guarantees the State ownership of all submerged land within that boundary.

II. SMALLER JURIDICAL BAY

The Special Master found the whole of Mississippi Sound to be a juridical bay; consequently, he did not then rule on Alabama's argument that a smaller bay exists on the eastern end of Mississippi Sound (Rpt. 8 n.3). If Dauphin Island is an extension of the Alabama mainland, but the whole of Mississippi Sound is not for whatever reason a juridical bay, Alabama requests a ruling that a juridical bay lies within Mississippi Sound east of a line from the western extremity of Dauphin Island to Point aux Chenes on the Mississippi mainland. *See* Attachment Four.

ARGUMENTS

I. HISTORIC LAND BOUNDARY

A. Background

In 1960, Alabama failed to establish its *seaward* boundary three leagues from its coastline. *United States v. Louisiana*, 363 U.S. 1, 82 (1960). The Court specifically denied the state's claim because there was neither preadmission nor postadmission facts which established or contemplated an Act of Admission boundary that included marginal seas. *Id.* at 13-30, 67-68. It was said of Louisiana's Act of Admission, 2 Stat. 701, and applied to Alabama's, 3 Stat. 489, that

"the act evidently contemplated no territorial sea whatever." *Id.* at 68. The Court concluded Alabama was entitled to rights in submerged lands lying three geographical miles from its coastline only by virtue of the Submerged Lands Act, 43 U.S.C. §1301 *et seq.* (1953). But the Court did not then determine the location of the state's coastline, 363 U.S. at 82 n.139, which is the issue of the present controversy. Alabama argued before the Special Master that *as historically interpreted* this coastline was coterminous with its Act of Admission boundary. The Master did not rule on that argument (Rpt. 33-34).

Alabama's Act reads in part, "thence, due south, to the Gulf of Mexico; thence eastwardly, including all islands within six leagues of the shore, to the Perdido River." 3 Stat. 489. It refers to one of two boundary lines, either a *seaward* boundary including marginal seas, which this Court held invalid, 363 U.S. at 82, or a *land* boundary enclosing the state's inland waters. If it is the latter, that boundary must lie along one of two areas, either the mainland as the United States contends, or Dauphin Island as Alabama contends.[1]

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[1]The United States argued before the Master that in 1960 the Court located Alabama's Act of Admission boundary along the mainland. Preliminary Post-argument Memorandum at 2. The U.S. drew support from the Court's statements in *United States v. Louisiana*, 363 U.S. at 67-68, 81 (1960) as did the Master in his report (Rpt. 33). But those statements, as the Master characterized them, prohibited a finding that Alabama's Act of Admission, *on its face*, established a boundary on the seaward side of Dauphin Island. But as Alabama has argued, those statements did not prevent a factual finding that, *as interpreted*, the Act of Admission established a boundary line. The Court said only that the Act did not include all waters within *three leagues* of the coast. If it had intended something more specific, it never would have added in the same opinion, "We express no opinion at this time on the location of Alabama's coastline." 363 U.S. at 83 n. 139. For as a practical and legal matter, Alabama's Act of Admission boundary and its coastline are identical for purposes of this argument.

B. Applicable Legal Principles

In 1845, the Court held that the 13 original states owned the lands beneath navigable inland waters within their boundaries and that by virtue of the equal-footing doctrine each subsequently admitted state acquired similar rights. *Pollard's Lessee v. Hagan*, 3 How. 212 (1845).[2] In 1977, the Court reviewed *Pollard* and determined that the rights acquired upon admission vested on admission and were permanent. *Oregon v. Corvallis*, 429 U.S. 363 (1977). Writing for the majority, Justice Rehnquist stated, "*Pollard's Lessee v. Hagan* holds that the state receives absolute title to the beds of navigable waterways within its boundaries upon admission to the Union, and contains not the slight-

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The U.S. contends further that a state invoking the "historic boundary" provisions of the Submerged Lands Act is restricted to that boundary and can claim nothing further. Preliminary Post-argument Memorandum at 6. Alabama's argument is a simple, straight forward argument under *Pollard's Lessee v. Hagan*, 3 How. 212 (1845). It is not based on the Submerged Lands Act; consequently, if Alabama's original land boundary circumscribed Mississippi Sound, as it does the other waters of the state, then those waters are inland quite apart from the Submerged Lands Act, as the U.S. conceeded in 1960. 363 U.S. at 66 n. 108. Even if Alabama fails in this argument and all other arguments, at worst it could claim the lands the U.S. now contends Alabama owns. The Court made this clear in *United States v. Florida*, 425 U.S. 791 (1976), *final decree*, by stating, "Florida is entitled to all the lands, minerals, and other natural resources underlying the Gulf of Mexico extending seaward for a distance of 3 marine leagues *from its coastline or its historic coastline, whichever is landward, but for not less than 3 geographic miles from its coastline*" ("Historic coastline" used in the decree referred to the coastline as it existed when Florida became a state) (emphasis added).

[2]*Pollard's* roots lie in the State Circuit Court of Mobile County, Alabama. *See generally, John Kemp, ex demise of the heirs of William Pollard v. James Thorp and John Hagan*, Cir. Ct., Mobile Co., Ala., Fall Term (1841), *partially reprinted* in 2 U.S. Sup. Ct. Transcripts of Records 972, 977-980 (1844), *aff'd sub nom., Kemp, ex dem. Pollard's Heirs v. Thorp*, 3 Ala. 291 (1842), *aff'd sub nom., Pollard's Lessee v. Hagan*, 3 How. 212 (1845).

est suggestion that such title is 'defeasible' in the technical sense of that term." *Id.* at 372. Subsequently he concluded, "Thus, if the lands at issue did pass under the equal-footing doctrine, state title is not subject to defeasance and state law governs subsequent dispositions." *Id.* at 378 (footnote omitted).

If the above is correct, two legal issues remain. Did the Submerged Lands Act alter the scope or effect of the equal-footing doctrine as applied in *Pollard*, and may the application of an international treaty to questions of vested state property rights devest a state of those rights? As to the first, Justice Rehnquist stated in *Corvallis*, "the Submerged Lands Act did not alter the scope or effect of the equal-footing doctrine, . . . The effect of the Act was merely to confirm the state's title to the beds of navigable waters within their boundaries as against any claim of the United States Government." 429 U.S. at 371. As to the second, the Court said in *Prevost v. Greenaux*, 19 How. 1 (1857), "certainly a Treaty, subsequently made by the United States with [a foreign nation] could not devest rights of property already vested in [a] state, even if the words of the Treaty had imported such an intention." *Id.* at 7, (parentheticals added).

Consequently if Alabama establishes an Act of Admission land boundary on the seaward side of Dauphin Island, the rights acquired on admission cannot be taken away. Neither the Submerged Lands Act nor the Convention on Territorial Sea and Contigious Zone, 15 U.S.T. 1606, T.I.A.S. No. 5639, affect those rights.

C. Applicable Facts

If the above legal analysis is correct, there remains only to determine whether the facts establish Alabama's historic land boundary along the seaward side of Dauphin Island. Alabama contends this boundary begins at the Alabama, Florida border on Perdido Bay and continues west

along the Fort Morgan Peninsula, Pelican Island, and Dauphin Island to the Alabama, Mississippi border. *See* Attachment One.[3]

1. Preadmission Descriptions

Based on the evidence before the Court in 1960, the Special Master found, "that during the period from 1756 and 1819 what is now Mississippi Sound was apparently considered by whatever nation possessed the surrounding mainland and islands as part of its possessions." (Rpt. 28)[4] These nations included Spain, France, and Great Britian and in this regard the Master's finding is significant. At the time of the creation of the Mississippi Territory, the Senate Committee studying the territory southward and westward of the State of Georgia had before it portions of Senate Document No. 105, 5th Cong., 2d Sess. 178 (1798), entitled "Boundary of Georgia and West Florida." (Al. Ex. 9-1; T. 261) The document discussed British boundary descriptions of West Florida. Of these descriptions the Senate wrote, "these documents are believed to be genuine, and have a tendency to explain the boundaries of Georgia and West Florida. *Id.*[5]

[3]Additional facts supporting this argument are made in Alabama's Post Trial Brief and Post Argument Brief. A rebuttal to U.S. historical arguments is contained in Alabama's Reply Post-Trial Brief at 2.

[4]The Master based this conclusion on the history discussed in *Foster and Elam v. Neilson*, 2 Pet. 253, 308-309 (1829), *Louisiana v. Mississippi*, 202 U.S. 1, 36-45 (1906), and *United States v. Louisiana*, 363 U.S. 1, 71-75 (1960).

[5]The Mississippi Territory as originally established did not include the area in dispute. 1 Stat. 549. The territory was enlarged in 1812 to include the area. 2 Stat. 734. The Alabama Territory was established from this enlarged area in 1817. 3 Stat. 371. However, prior to 1812 the area now in dispute was included in British West Florida.

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The substantive part of the document reads, in reference to Peter Chester's appointment as Governor of British West Florida, "with these instructions you will receive our commission under our great seal of Great Britian, consituting you our Captain-general and Governor-in-Chief in and over our provinence of West Florida, in America, *bounded to the southward by the Gulf of Mexico, including all islands within six leagues of the coast . . . .*" *Id.* (emphasis added)

The Mississippi Territory was established in the same year. 1 Stat. 549 (1798). That territory was enlarged in 1812 and the Alabama Territory was established in 1817 with a southern boundary which reads in part, "thence due south to the Gulf of Mexico, thence eastwardly, including all the islands within six leagues of the shore . . . ." 3 Stat. 371, 372 (1817).

If, as the Master decided, Great Britian considered the water between Dauphin Island and the mainland as its possession, and Congress relied on the British boundary description to formulate Alabama's boundary, it may be assumed that Congress considered the area to be within the United States. Subsequent preadmission descriptions of the area and postadmission interpretations of Alabama's boundary confirm this assumption.

William Darby, a British explorer and geographer, visited the Alabama coast and wrote about it extensively. He was described by the United States' historical expert as one familiar with the States' Enabling Acts and aware of their boundary descriptions (T. 1399-1400). In 1817 Darby wrote, A Geographical Description of the State of Louisiana, the southern part of the State of Mississippi, and Territory of Alabama (1817) (Al. Ex. 15; T. 1225; Jt. Ex. 169; T. 1492).[6] There he specifically included the water area along Dauphin Island within the Alabama Territory. He wrote:

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[6]Darby also published, The Emigrant's Guide to the Western and Southwestern States and Territories in 1818. It contained the identical passage quoted below. (Ms. Ex. 50; T. 1489)

> There is an elongation of the Alabama territory south of the 31° north latitude and lying between the east boundary line of the State of Mississippi and the Perdido River. This tract covers about 3850 square miles, including Mobile Bay, and the islands Dauphin, Massacre, Petitebois, *together with the expanse of water between the islands and the mainland.* This tract formed once a part of West Florida, and is of more importance from its position than from either its extent or production.

Alabama exhibit 15 (emphasis added).

In the same year the Standing Committee of the House of Representatives on the Public Lands had before it Authur Stansbury's document entitled, *Map of the State of Mississippi drawn for the use of the Standing Committee of the House of Representatives on the Public Lands.*[7] The applicable portion of the map as introduced labels the area above Dauphin Island as "Pascagoula Bay" separate and distinct from the Gulf of Mexico. (Jt. Ex. 40-29; T. 668, 685) This was the area described by Darby as the "expanse of water between the islands and the mainland." *See* Post Argument Brief of the State of Alabama, Appendix B(3).

2. Postadmission Interpretations

a. Dauphin Island Boundary

In 1827, J. Drayton produced *A Geographical, Statistical, and Historical Map of Alabama.* On the map margin he described Alabama as, "situated between 30° 12′ and 35° N. lat." The map proper is calibrated along its left-hand border in ten minute segments up to 35° north latitude. Dauphin Island lies at 30° 12′. The mainland lies at 30° 20′ (Jt. Ex. 40-39; T. 669, 686). *See* Post Argument Brief of the State of Alabama, Appendices A(2)(a), (b), and (c).

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[7]The original of this map is housed in the Library of Congress which established the date as [1817].

In 1836, William Darby and Theodore Dwight wrote, *A New Gazetteer of the United States.* They placed Alabama's southern boundary at 30° 10′ (Ms. Ex. 53 at 8; T. 1497, 1498). Maps produced contemporaneously with the Drayton and Darby boundary interpretations support this location. One drawn by Curtis Lewis in 1820, *A Map of Mobile Bay in the State of Alabama* (Jt. Ex. 40-32; T. 669, 686) and another by Timothy Conrad in 1830, *A Travelers Pocket Map of Alabama* (Jt. Ex. 40-43; T. 669, 686) located Dauphin Island between 30° 12′ and 30° 13′ and the mainland at or near 30° 20′. *See* Post Argument Brief of the State of Alabama, Appendices A(3) and B(4).[8]

Dauphin Island currently lies near 30° 13′ north latitude (Jt. Ex. 1-11373; T. 669; and Jt. Ex. 45-3; T. 690). *See* Attachment Two.[9]

b. Gulf of Mexico — Mississippi Sound Boundary

This Court said of the State of Louisiana, "the boundary line is drawn down the middle of the river Iberville '*to* the Gulf of Mexico,' not *into* it for any distance. The State is thence to be bounded '*by the said gulf*' not by a line located three leagues out in the Gulf . . . ." *United States v. Louisiana,* 363 U.S. 1, 67 (1960) (emphasis in original). That boundary and the location of the Gulf of Mexico was established earlier as south of Cat Island. *See Louisiana v. Mississippi,* 202 U.S. 1, 58, *final decree.*

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[8]The Curtis Lewis map was utilized by the Committee on Military Affairs of the U.S. House of Representatives in 1822. *See* Alabama Exhibit 17-7; T. 1094 and the Master's Report at 36 for a discussion of the Committee's actions.

[9]Dauphin Island, although growing east to west, has not grown north or south in recent geological time (Jt. Ex. 154* at 210; T. 535).

Alabama's boundary reads, "to the Gulf of Mexico" and is presumably subject to the same interpretation. The issue is, what was the understood location of the Gulf of Mexico at Alabama's statehood? Historical geographers, Congress and the Court have commented on this question.[10]

1. Historical Geographers

Geographers described the dividing line between the Gulf and Mississippi Sound principally in terms of the water area above Dauphin Island.[11] William Darby and Theodore Dwight, Jr. described the area as:

> Pascagoula Sound, is a sheet of water spreading along the southwestern border of Alabama, and the southeastern of Mississippi, extending in length 55 ms. from the Pass of Heron w. to the Pass of Christian, with a mean width of about 8 ms. *It is separated from the gulf of Mexico, by a chain of low, narrow sand islands, named, advancing from E. to W., Dauphin's, Massacre, Petite Bois, Horn, Dog, Ship and Cat island.* The depth of the water in the sound is generally about from 10 to 18 feet, but no vessels drawing more than 6 feet can be navigated through the passes. The depth increases rapidly on the Gulf side of the island.

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[10]Conflicting oral evidence at trial was given by the parties' experts. The documentary evidence, save one exhibit, established a dividing line between the Gulf of Mexico and Mississippi Sound. An interpretation contrary to the States' is taken in United States Exhibit 14-8 (T. 1307). That document seems to place the Gulf of Mexico along the mainland although no direct statement of such is made. The descrepancy is based on one interpretation of Alabama's Enabling Act, Section 3, 3 Stat. 490 (1819). Alabama does not share that view. *See* Post Argument Brief of The State of Alabama at 15.

[11]This water area was known as Pascagoula Sound, Pascagoula Bay, and at times by its qualities with no name attached. The first description of the water area as "Mississippi Sound" was in 1845, (Jt. Ex. 191-25; T. 704), twenty-one years earlier than the Court noted in *Louisiana v. Mississippi*, 202 U.S. at 48.

Darby and Dwight, *A New Gazetter of the United States* (1830) (Ms. Ex. 55 at 394; T. 1508) (emphasis added).[12] In 1836, Darby and Dwight placed the Alabama boundary along the Gulf of Mexico at "lat. 30° 10′ ", consistant with their earlier location of Alabama's land boundary and their above description of the water area. Darby and Dwight, *A New Gazetter of the United States* (1836) (Ms. Ex. 53 at 10; T. 1498). This interpretation is confirmed by a passage in the same document which reads, "The state is . . . very advantageously supplied with navigable rivers, though possessing within its own limits but one outlet to the Gulf of Mexico by Mobile Bay." (Ms. Ex. 53 at 10; T. 1498).

Other historical descriptions of Mississippi Sound agree. In 1844, Daniel Haskel and Calvin Smith wrote, *A Complete Descriptive and Statistical Gazetteer of the United States of America.* They described Pascagoula Sound as, "Situated off the mouth of Pascagoula r., in the Gulf of Mexico, from which it is separated by low, narrow islands. It is about 55 ms. long, with an average breadth of 8 ms." (Ms. Ex. 58 at 512; T. 1518). Some nine years later, John Hayward wrote, "Pascagoula Sound, Mi. and Aa., into which Pascagoula River empties, is separated from the Gulf of Mexico by several low, narrow islands. Its average breadth is 8 miles, and its length about 55 miles." *A Gazetteer of the United States* (1853) (Ms. Ex. 59 at 23, T. 1521). And in the same year Thomas Baldwin and J. Thomas wrote, "Pascagoula Bay, of the Gulf of Mexico, is situated at the S.E. extremity of the Mississippi, and at the mouth of

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[12]Darby's understanding of the physical characteristics of Mississippi Sound is confirmed by modern scientific data. See Alabama exhibit 2-12, a U.S. Corps of Engineers' graph of water depth versus distance into the Gulf. Within 1,000 feet of Dauphin Island the depth drops ten feet. Within 2,250 feet the drop approaches 30 feet.

the Pascagoula River. Low narrow island separate it from the Gulf." *A New and Complete Gazetteer of the United States* (1853) (Ms. Ex. 60 at 884; T. 1528).[13]

2. Congress

The Master utilized Congressional material to find that Mississippi Sound was an historic bay (Rpt. 36-39). This identical material supports Alabama's contention that Congress believed the dividing line between the Gulf of Mexico and Mississippi Sound was along Dauphin Island. It is therefore unnecessary to reiterate it here except to emphasize that regardless of Congressional intent at the moment in time Alabama became a state, from that time forward Congress has considered the waters landward of Dauphin Island to be inland waters of Alabama.

3. Supreme Court of the United States

This Court held in *Louisiana v. Mississippi*, 202 U.S. 1 (1906) that the Louisiana and Mississippi Acts of Admission produced a dividing line between the states which followed a deep-water chanel "*through the northeast corner of Lake Borgne . . . south through Mississippi Sound, through South Pass between Cat Island and Isle d'Pitre, to the Gulf of Mexico . . . .*" *Id.* at 58, *final decree* (emphasis added). The

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[13]Historical geographers described "Pascagoula Bay" as part of the Gulf of Mexico. The U.S. implied, if the Sound is part of the Gulf, the boundary description "to the Gulf" means, to the mainland shore. (See T. 506-507, 509-511). This Court used the phrase "enclosed arm of the sea" to describe Mississippi Sound. This connotes not only that one water body is part of the other, but also that there is a separation. (*See generally, Louisiana v. Mississippi*, 202 U.S. 1 (1906). The Court explained the phrase in *Cunnard v. Mellon*, 262 U.S. 100 (1922) by citing *Louisiana v. Mississippi* as precedent for the proposition that U.S. territory includes, "enclosed arms of the sea" *and* a "marginal belt of sea" extending out three nautical miles. *Cunnard* at 122. While Mississippi Sound may be considered a part of the Gulf (the sea) it is also an enclosed part of the United States separate from the Gulf for boundary purposes.

Louisiana, Mississippi, *and* Alabama boundary descriptions all read, "to the Gulf of Mexico." If the Gulf lies along the mainland, as the U.S. contends, the Court's finding of the Louisiana, Mississippi boundary would be inaccurate. Similarly, a finding that the Gulf lies seaward of Isle a' Pitre, Louisiana, and Cat Island, Mississippi, but not south of Dauphin Island would be inconsistent if not equally inaccurate. However, if the Gulf lies seaward of all the islands, this Court would be consistent with its predecessor's determination that Mississippi Sound, "is not an open sea, but a shallow arm of the sea . . . ." *Louisiana v. Mississippi*, at 52.[14]

c. Federal Government's Interpretation of Alabama's Boundary

From 1940 to the present various Federal agencies interpreted Alabama's boundary along the seaward side of Dauphin Island. The following is a summary:[15]

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[14]The 1905 Court did not regard the Louisiana, Mississippi, and Alabama Acts as *in pari materia*. *See Louisiana v. Mississippi*, at 41. Alabama does not ask that the Acts be construed *in pari materia* but only that the factual finding of the location of the Gulf of Mexico be applied presently.

[15]The U.S. argued in its Post-trial Reply Brief at 24-25 that the Government's interests may not be forfeited through agencies' mistakes or negligence. This Court held in *United States v. California*, 332 U.S. 19, 34-40 (1947) that the interests of the Government in the *ocean* are not to be forfeited as a result of agencies' negligence. This is quite a different situation from the present. The question whether the Government does or does not own certain ocean areas can not be determined until Alabama's land boundary is located for purposes of *Pollard*. Government agencies' interpretations of that boundary are relevant and entirely

U.S. AGENCY OR OFFICIAL	INTERPRETATION
Department of Commerce; Bureau of the Census (1940)	The Alabama, Mississippi border traverses Mississippi Sound into the Gulf of Mexico. All waters east of that line are inland waters of the State of Alabama. Its land boundary is along the seaward side of Dauphin Island

appropriate to determine a *domestic* boundary of this nature. *See Louisiana v. Mississippi*, at 55-57 where the Court reviewed Government agencies' interpretations of the States' boundaries. The importance of federal interpretations of Alabama's boundary is that if the boundary is located along Dauphin Island, it will have no effect on the U.S. international boundary in the Gulf of Mexico. The seaward line would remain constant. The domestic boundary would eliminate only the high seas enclaves in Mississippi Sound. Here like the situation in *Skiroites v. Florida*, 313 U.S. 69 (1940), "no question of international law, or of the extent of the authority of the United States in its international relations is presented." *Id.* at 72. So being, the Court said in *Skiroites*, "International law . . . is a part of our law for the application of its own principles, and these are concerned with international rights and duties and not with domestic rights and duties." *Id.* at 73.

Similarly, when the Court adopted the Geneva Convention for purposes of defining inland waters under the Submerged Lands Act it did so to establish, "a single coastline for both the administration of the [Act] and the conduct of our future international relations." *United States v. California*, 381 U.S. 139, 165 (1965). Implicit in that adoption is that international relations would be affected by a decision in a state "tidelands" dispute. There is no such effect here. The geographer for the U.S. Department of State testified that if Alabama's theories are accepted U.S. territorial waters would not be extended any further out to sea than they are presently (T. 2380).

In light of this the U.S. still maintains there is an impending international law issue. That is, their position serves the foreign affairs purpose of maintaining consistent U.S. foreign policy. As this is their only justification for application of international law to the issue, it fails. The Court said in 1969, "a contraction of a state's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable. *United States v. Louisiana*, 394 U.S. 11 n.97 (1969).

	(Al. Ex. 22-1, Appendix B at 45; T. 1025-26).[16]
Secretary of the Interior (1951)	Mississippi's boundary is on the Gulf side of the barrier islands (Jt. Ex. 106-1; T. 669, 696).[17]
Acting Cadastral Survey Engineering Staff Officer (1954)	The approximate position of the line of ordinary low water for the State of Alabama is outside the inland waters of Mississippi Sound (Al. Ex. 16-3; T. 1094).
Director of the Bureau of Land Management (1956)	Based on Alabama's Enabling Act boundary the state's coastline follows the outer limit of Dauphin Island (AL. Ex. 16-8; T. 1094).
Solicitor General (1956)	*Louisiana v. Mississippi* located the boundary between Louisiana and Mississippi in the inland waters of Mississippi Sound. Brief of the United States in Support of Motion for Judgment, *United States v. Louisiana*, No. 11, Original, October Term (1956) at 17.

[16]The Master rejected Louisiana's argument that the Census Boundary constituted a system of straight base lines. Report of Walter P. Armstrong, Jr., Special Master, *United States v. Louisiana*, No. 9, Original, October Term (1974) at 11. Louisiana did not, however, argue this line was a legitimate *interpretation* of its historic land boundary. Alabama contends it is one of many such interpretations.

[17]The "Chapman Line" is the subject of this exhibit. This Court rejected Louisiana's estopple assertion against the U.S., as that assertion was partly based on the line. Louisiana did not assert the line as a legitimate *interpretation* of its historical land boundary. *United States v. Louisiana*, 394 U.S. 2 at n.97. The Master rejected the line as a system of straight baselines. *United States v. Louisiana*, Report of Walter P. Armstrong, Jr., at 10, but the Master did accept the line as a basis of his determination that Mississippi Sound was an historic bay. (Rpt. 41-44).

Solicitor General (1957)	In *Louisiana v. Mississippi* the Court described Mississippi Sound as inland waters. These inland waters passed to the state upon entry into the union under the doctrine of *Pollard's Lessee v. Hagan*, 3 How. 212 (1845). Brief of the United States in Support of Motion on Amended Complaint, *United States v. Louisiana*, No. 11, Original, October Term, (1957) at 254.
Solicitor General (1957)	The water between the islands and the Alabama mainland is inland water. *Id.* at 261.
Director of the Bureau of Land Management (1958)	All tracts offered by Alabama in its 1958 oil lease sale, except those beyond three miles from the barrier islands, are proper (Al. Ex. 16-11; T. 1099).
G. Etzel Pearcy, Geographer for the State Department (1958)	Depicted on nautical charts 1266, 14th Ed., Rev. 10/6/58, and 1267, 6th Ed., Rev. 8/4/58, Alabama's land boundary and coastline are along the seaward side of Dauphin Island (Jt. Ex. 2; T. 669).[18]
Assistant Director, Bureau of Land Management (1963)	Mississippi's seaward boundary lies three miles from the mean low water line of the outer Mississippi Sound islands (Al. Ex. 16-3; T. 1094).

[18]This "Pearcy Chart" was not an official chart of the U.S. Government but was an interpretation of Alabama's boundary by Mr. Pearcy then Geographer for the U.S. Department of State.

Department of the Interior (1968)	On an outer continental shelf leasing map Mississippi's three geographical mile line is measured from the barrier islands (Al. Ex. 17-21; T. 1094).
Department of the Interior (1968)	On an outer continental shelf leasing map Alabama's three geographical mile line is measured from Dauphin Island (Al. Ex. 17-22; T. 1094).
Geological Survey (1970-1980)	On a U.S. Department of Interior Land Use map Alabama's political unit boundary is drawn along Dauphin Island (Al. Ex. 22-3; T. 1035-36).[19]
Geological Survey (1972-1980)	On a U.S. Department of Interior Land Use map Alabama's Land Use boundary is drawn along Dauphin Island. Mississippi Sound is classified as inland waters (Al. Ex. 22-5; T. 1032, 1034). *See* footnote 19 above.
Corps of Engineers (1973)	The Gulf of Mexico shoreline is along the barrier islands (Al. Ex. 17-25; T. 1094).

[19]This map and Alabama Exhibits 22-5 and 22-7 were produced in coordination with the State of Alabama pursuant to the directives in, "A Land Use and Land Cover Classification System for Use with Remote Sensor Data", Geological Survey Professional Paper 964 (Al. Ex. 22-4; T. 1032). That publication clearly specifies that water areas are included in the system, "only when they are considered to be inland water and therefore are included within the total area of the United States." *Id.* at 17, ¶ 54. The information depicted on the map is utilized by the State to plan, to develop, and to conserve resources. All land use planning is judged by this baseline (T. 1028).

The base map used for Alabama Exhibits 22-3, 22-5 and 22-7 is "Mobile, NH 16-4," the identical base map which was the initial subject of the present controversy (Al. Ex. 22-2; T. 1027). See Exhibit A, Report of Walter P. Armstrong, Jr., Special Master, filed April 30, 1984.

Geological Survey 1974-1980	On a U.S. Department of Interior Land Use map Alabama's Hydrologic Unit boundary is drawn along Dauphin Island (Al. Ex. 22-7; T. 1042, 1043). *See* footnote 19 above.
Environmental Protection Agency (1979)	The entire Alabama portion of Mississippi Sound is within the state for purposes of water pollution control. No enclaves are present (Al. Ex. 6-7, 6-8; T. 1059, 1060).
Commerce Department (1979)	Alabama's coastal zone boundary is along Dauphin Island and includes all coastal waters north to the ten foot contour line. No enclaves are depicted (Al. Ex. 21-6; T. 1086). *See* Attachment Three.[20]

The eighteen items above are similar to those discussed in *United States v. Maine*, 420 U.S. 515 (1975). The issue there was whether to reverse *United States v. California*, 332 U.S. 19 (1947). The issue here (see (b)(3) above) may be whether to change the boundary located in *Louisiana v. Mississippi*. Of the Maine situation the Court said:

> It is apparent that in the almost 30 years since California, a great deal of public and private business has been transacted in accordance with those

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[20]Alabama's coastal zone boundary was determined in accordance with the U.S. Department of Commerce "Alabama Coastal Area Management Program and Final Environmental Empact Statement", August, 1979 (Al. Ex. 21-6; T. 1086). That program document identified all federally owned lands within Alabama's coastal area. No lands under Mississippi Sound were identified.

The boundary of Alabama's coastal area was approved by Robert W. Knecht, Assistant Administrator, National Oceanic and Atmosphere Administration. Mr. Knecht was the Office of Coastal Zone Management's representative at the Government's Baseline Committee meetings (T. 2385).

> decisions and in accordance with major legislation enacted by Congress, a principal purpose of which was to resolve the "interminable litigation" arising over the controversy of the ownership of the lands underlying the marginal sea. See HR Rep. No. 215, 83rd Cong, 1st Sess, 2 (1953). Both the Submerged Lands Act and the Outer Continental Shelf Lands Act which soon followed proceeded from the premises established by prior Court decisions and provided for the orderly development of offshore resources. Since 1953, when this legislation was enacted, 33 lease sales have been held, in which 1,940 leases, embracing over eight million acres, have been issued. The Outer Continental Shelf, since 1953, has yielded over three billion barrels of oil, 19 trillion mcf of natural gas, 13 million long tons of sulfur, and over four million long tons of salt. In 1973 alone, 1,081,000 barrels of oil and 8.9 billion cubic feet of natural gas were extracted daily from the Outer Continental Shelf. Exploitation of our resources offshore implicates a broad range of federal legislation, ranging from the Longshoremen's and Harbor Worker's Compensation Act, incorporated into the Outer Continental Shelf Lands Act, to the more recent Coastal Zone Management Act.

United States v. Maine, at 527.[21]

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[21]The logic behind this reasoning is similar to the Court's admonition that "It would be quite [a step] to allow the United States to prevent recognition of a historic title which may already have ripened because of past events but which is called into question for the first time in a domestic law suit." *United States v. Louisiana*, 394 U.S. at 77 n.104. The Master applied this principle in his historic bay discussion (Rpt. 46-57).

d. State of Alabama's Interpretation of Its Boundary

Alabama has conducted all of its relevant business in accordance with a southern boundary along Dauphin Island. Since 1930, the state has entered over 50 oil and gas leases in Mississippi Sound, many of which are in the specific disputed area (Al. Ex. 4-3, 4-4 and 4-5, leasing authority; T. 848, 959, 970; Jt. Ex. 39-1-1 to 39-1-29, seismic permits; T. 983; Jt. Ex. 39-2-1 to 39-2-287, oil and gas leases; T. 1234). Business conducted and permits issued under Alabama's coastal zone management program (Al. Ex. 21-1 to 21-7; T. 1086, 1089) water pollution control program (Al. Ex. 6-1 to 6-8; T. 1053-60) fishery management program (Al. Ex. 3-2 to 3-14; T. 810-848) and land use program (Al. Ex. 22-5, 22-4, 22-3, 22-7; T. 1034, 1032, 1036, 1043) were all based on the identical boundary.[22]

In 1939, prior to this Court's ruling that the states had no title to the marginal sea, *United States v. California*, 332 U.S. 19 (1947), Alabama entered into an oil and gas lease with W. L. Stewart for the entire Alabama portion of the Mississippi Sound (Jt. Ex. 39-2-3; T. 677). *See* Jt. Ex. 39-1-1 to 39-1-3 for an explanation of the area covered in this lease. In 1956, after this Court's ruling in the California case, Alabama entered into an oil and gas lease with W. H. Drinkard for the identical Alabama portion of Mississippi Sound (Jt. Ex. 39-2-90; T. 677). Both leases were based on a land boundary and coastline lying along the seaward side of Dauphin Island.

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[22]Admittedly these activities may be exercised in both inland and territorial waters; but they are also, on the other hand, legitimate interpretations of Alabama's historic land boundary and are of the nature discussed in *United States v. Maine*.

Fishery management jurisdiction was assumed until questioned in February, 1980. (See Al. Ex. 12-3; T. 1094). The issue was resolved in 1983 when Congress confirmed the State's authority over enclave areas. *See* 16 U.S.C. §1856(a) (1983).

In 1929 Alabama's boundary was judicially interpreted in *Bosarge v. State*, 121 So. 427 (Ala. Cr. App. 1929), *cert. denied*, 121 So. 428 (Ala. 1929). The Alabama Court reviewed a criminal conviction relating to fishery management. The sole issue was whether the defendants were in Alabama waters. The Court based its decision on testimony which included the arresting officer's statement:

> The men were at the cut. You can make their position in any direction you mind from Dauphin Island. Any southerly direction. That is to say you can make it south or southwest, or south by west, almost any direction like that which would be southwardly. However, to make it clear they were outside of Dauphin Island about three quarters of a mile from the beach, and outside of the low water mark in the Gulf of Mexico. That is to say about three quarters of a mile from the beach.

Alabama exhibit 9-18; T. 1094.

After quoting Alabama's Enabling Act boundary with emphasis on, "including all islands within six leagues of the shore," the Court said:

> We think, and hold, that since Dauphine Island is admittedly *one* of the "islands within six leagues of the shore," referred to in the above description, and since there is no other such island lying *south* of Dauphine Island, necessarily the southern boundary line, or coast line, of Dauphine Island became the southern boundary line of Alabama.

Bosarge v. State, 121 So. at 428 (emphasis in orginal). The Court reasoned, based on *Manchester v. Massachusetts*, 139 U.S. 240 (1891), that if the State has territorial jurisdiction three nautical miles from its Dauphin Island boundary, the

defendants were within Alabama and subject to the State's criminal statutes as they were within three miles of Alabama's southern land boundary, the coast of Dauphin Island. *Id.*[23]

The above interpreted boundary has been a part of Alabama's Constitution since 1819 and its statutes since 1852. While Alabama incorrectly believed it owned all submerged lands within three leagues of its boundary, the state has never waivered on its interpretation of the point from which its inland waters are measured — the seaward side of Dauphin Island.[24]

II. SMALLER JURIDICAL BAY

The Special Master wrote, in relation to the state's argument that Dauphin Island is an extension of the mainland:

> Alabama also argues that if this is true and Mississippi sound as a whole is not a true bay, then a smaller juridical bay exists with a closing line from the western extremity of Dauphin Island to Point Aux Chenes. While this would appear to be true (see Stipulations 4 and 5) it is unnecessary for me to pass upon this point in view of my subsequent findings.

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[23]The holding is obviously prior to the 1947 *United States v. California* decision. The Alabama Court assumed the state had rights in the marginal sea. As the state did not, the conviction should have been reversed because the Court held the island boundary was a land boundary.

[24]Until this litigation arose, Alabama was never asked to prove the location of its land boundary. In fact, not until 1978 did it have notice that the U.S. opposed its claim to Mississippi Sound. *See* United States Answers to Second Interrogatories Propounded by State of Alabama, no. 10. And in addition, the U.S. intentionally withheld its position from Alabama in order to gain an advantage in litigation of this type. *See* Mississippi exhibit 101.

Report at 8 n.3.

Alabama seeks a ruling on this question to save a possible remand to the Master. Alabama's contention is depicted on Alabama Exhibit 8-3; T. 1221. A facimile is reproduced as Attachment Four.

The facts are undisputed. The parties stipulated that the line between Dauphin Island and Point aux Chenes is less than 24 nautical miles and that the area enclosed by the line satisfies the semi-circle test of the Convention on the Territorial Sea and Contigous Zone. The United State's international law expert testified that if Dauphin Island were an extension of the mainland, there is a sufficient indentation to satisfy Article Seven of the Convention (T. 1940). Consequently, all factors of the Convention are satisfied.

CONCLUSION

Alabama respectfully requests its Motion be granted and that a supplemental decree be entered establishing Alabama's land boundary and coastline along the seaward side of Dauphin Island.

Respectfully submitted,

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Robert A. Macrory
Special Assistant Attorney General

PROOF OF SERVICE

I, Benjamin G. Cohen, Special Assistant Attorney General for the State of Alabama and a member of the Bar of the United States Supreme Court, hereby certify that all parties to this action required to be served have been served with three copies of the *Exceptions of the State of Alabama to the Report of the Special Master filed April 30, 1984, and Brief in Support Thereof*, on this 24th day of June, 1984, by next day express mail, postage prepaid and properly addressed to:

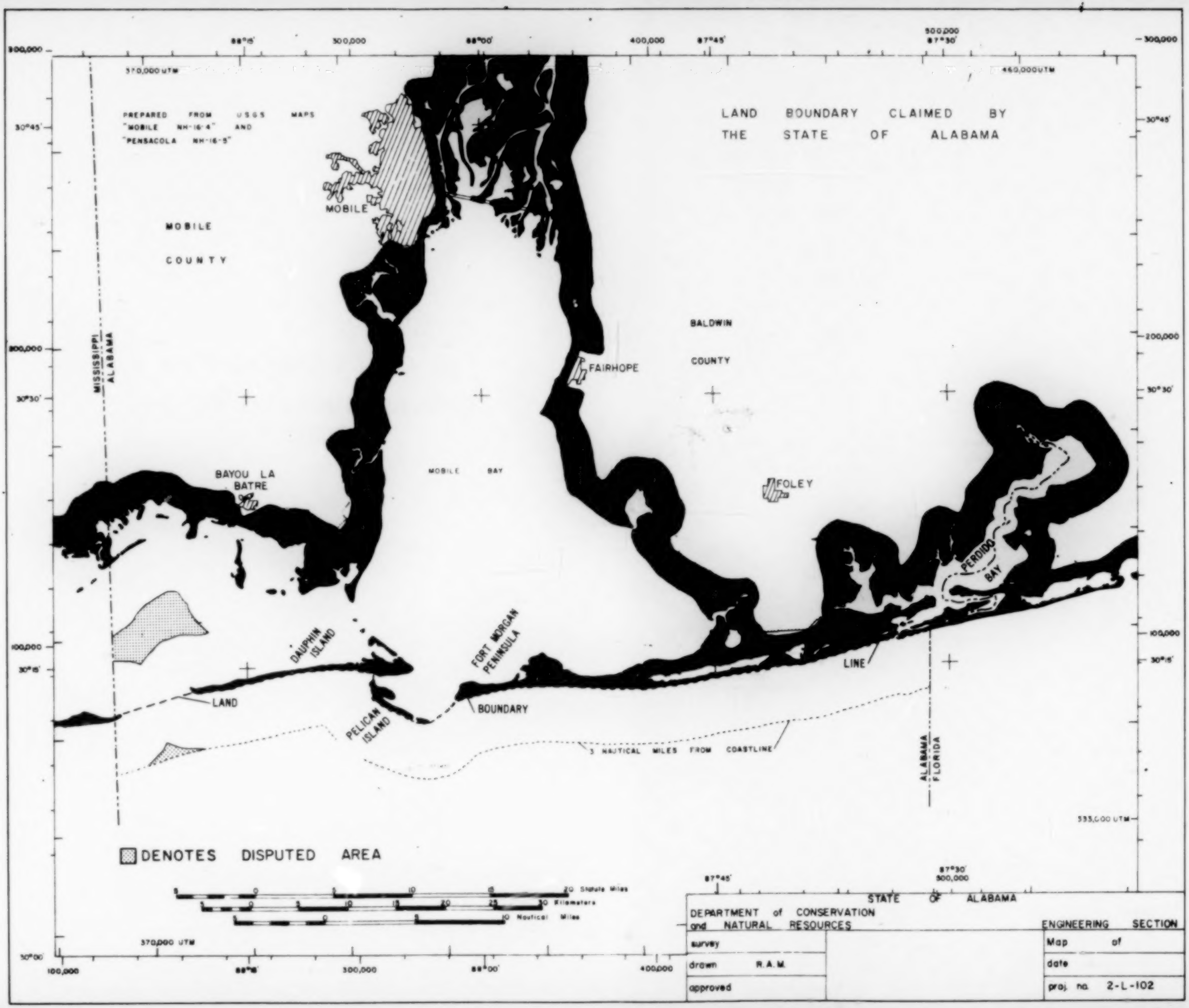
Donald Carr, Esquire
Attorney, Department of Justice
Todd Building, Room 639
Washington, D.C. 20530

Jim Bruce, Esquire
Special Assistant Attorney General
State of Mississippi
Post Office Box 37
Kennett, Missouri 63857

Thomas Y. Page, Esquire
Upshaw and Ladner
Special Assistant Attorneys General
400 Riverhill Tower
1675 Lakeland Drive
Jackson, Mississippi 39216

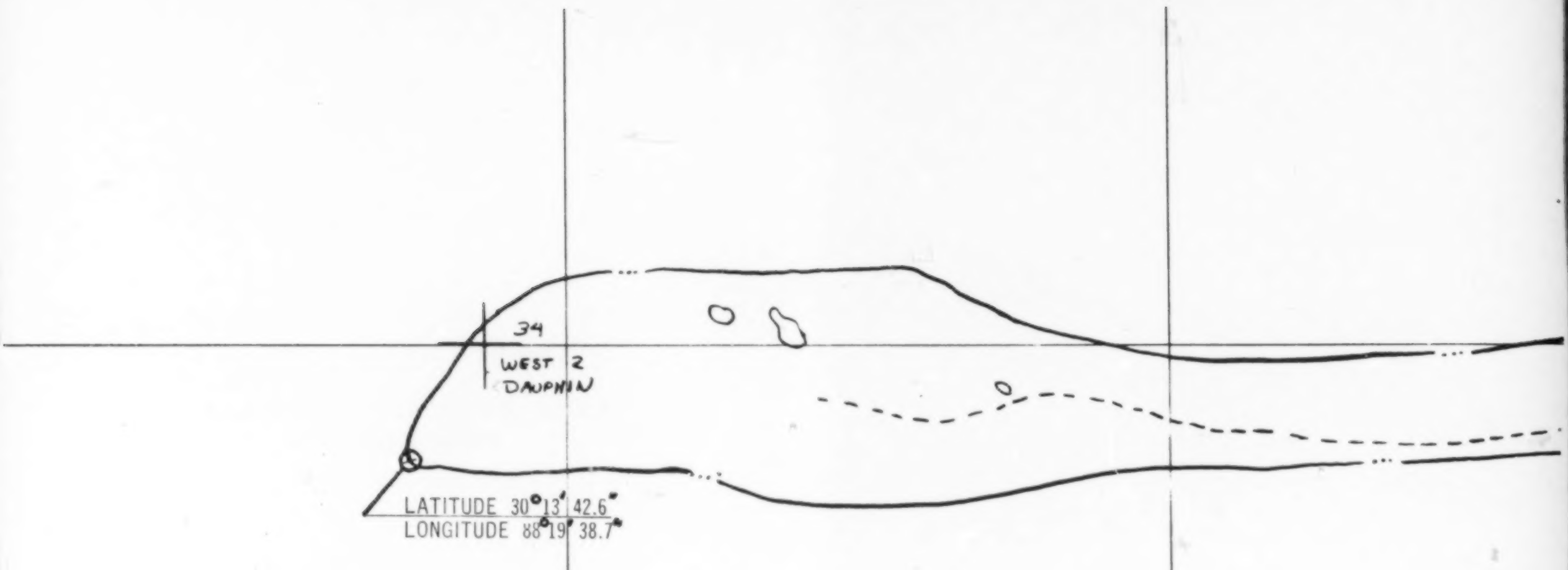
ATTACHMENT ONE

LAND BOUNDARY CLAIMED BY ALABAMA


LAND BOUNDARY CLAIMED BY THE STATE OF ALABAMA
PREPARED FROM USGS MAPS "MOBILE NH-16-4" AND "PENSACOLA NH-16-5"
MOBILE
MOBILE COUNTY
BALDWIN COUNTY
FAIRHOPE
FOLEY
MOBILE BAY
BAYOU LA BATRE
MISSISSIPPI ALABAMA
DAUPHIN ISLAND
FORT MORGAN PENINSULA
PELICAN ISLAND
LAND BOUNDARY LINE
3 NAUTICAL MILES FROM COASTLINE
PERDIDO BAY
ALABAMA FLORIDA
DENOTES DISPUTED AREA
20 Statute Miles
30 Kilometers
10 Nautical Miles
370,000 UTM
460,000 UTM
533,000 UTM
88°15'
88°00'
87°45'
87°30'
30°45'
30°30'
30°15'
30°00'
300,000
400,000
500,000
200,000
100,000
STATE OF ALABAMA
DEPARTMENT of CONSERVATION and NATURAL RESOURCES
ENGINEERING SECTION
survey
drawn R.A.M.
approved
Map of
date
proj. no. 2-L-102

ATTACHMENT TWO

CURRENT DAUPHIN ISLAND LATITUDE



PHOTOCOPY OF A SECTION OF JOINT EXHIBIT 45-3 (ATLANTIC AERIAL SURVEY OF MISSISSIPPI SOUND)

(SEE STIPULATION NO. 3)

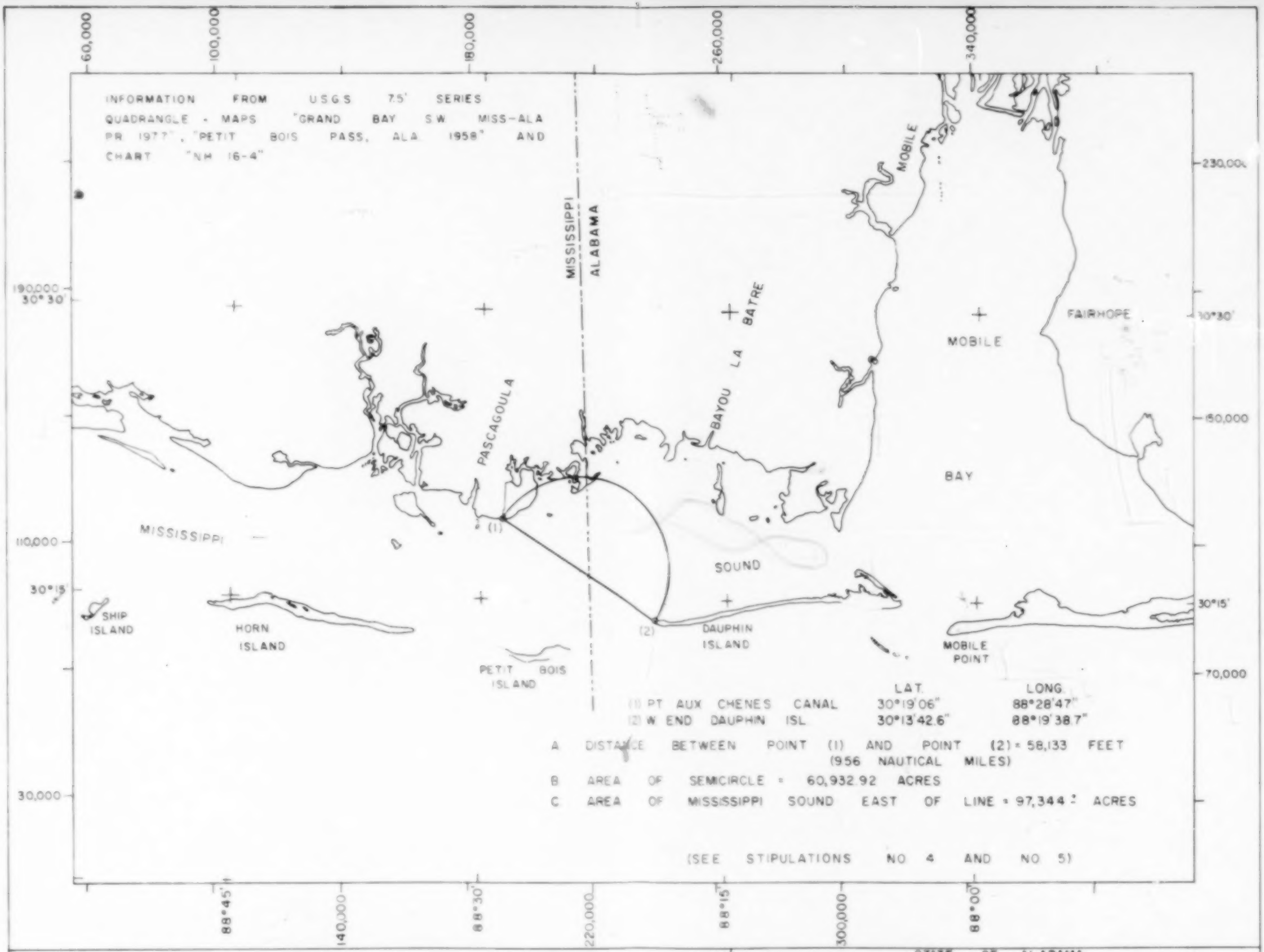
ATTACHMENT THREE

ALABAMA COASTAL AREA BOUNDARY

Figure 1-1 Coastal area boundary.

ATTACHMENT FOUR

EASTERN MISSISSIPPI SOUND SEMICIRCLE TEST



STATE OF ALABAMA
DEPARTMENT of CONSERVATION and NATURAL RESOURCES
ENGINEERING SECTION

survey	CHART OF SEMICIRCLE TEST AREA	date 5-31-84
drawn R.A.M.		
approved C.B.R.		proj. no 2-L-102